

JONES DAY

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August 31, 2017

VIA ELECTRONIC FILING

Mark J. Langer, Esq.
Clerk, United States Court of Appeals for the District of Columbia Circuit
E. Barrett Prettyman U.S. Courthouse
333 Constitution Avenue, NW, Room 5205
Washington, D.C. 20001-2866

Re: *Midwest Division – MMC, LLC d/b/a Menorah Medical Center v. NLRB*,
D.C. Cir. Nos. 15-1312, 15-1359

Dear Mr. Langer:

On behalf of Midwest Division – MMC, LLC d/b/a Menorah Medical Center (“Menorah” or the “Hospital”), this letter and the enclosed proposed judgment respond to the August 22, 2017 proposed judgment submitted by the National Labor Relations Board (“NLRB” or the “Board”) in the above-captioned matter. Pursuant to Rule 19 of the Federal Rules of Appellate Procedure, a party who disagrees with the agency’s proposed judgment may submit its own proposed judgment that “the party believes conforms to the opinion.” Fed. R. App. P. 19. The Board’s proposed judgment fails to conform to the Court’s August 18, 2017 opinion’s findings (the “Opinion”) regarding the Kansas regulatory scheme to which the Hospital is subject in two respects.

First, by requiring the Hospital to “revise or rescind” the confidentiality rule contained in its Risk Management Plan (the “Plan”) within 14 days of entry of judgment enforcing the Board’s order, the NLRB’s proposed judgment ignores the fact that the State of Kansas must approve changes to the Plan. As a condition of its license to operate in the State of Kansas, the Hospital is required to maintain a Plan that has been approved by the state. And second, by requiring the Hospital to provide to the National Nurses Organizing Committee – Kansas/National Nurses

Mark J. Langer, Esq.
August 31, 2017
Page 2

United (the “Union” or “NNOC”) all of the information at issue – without any limitations on the information’s use or dissemination – the Board’s proposed judgment ignores the Hospital’s obligations under Kansas law to maintain the confidentiality of certain of the requested information notwithstanding the court’s order to produce the information to Union.

I. The Board’s Proposed Judgment Fails to Conform to the Opinion by Ignoring the State of Kansas’s Role in Approving the Risk Management Plan.

Kansas law requires the Hospital to maintain a risk management program, one component of which is a state-approved Risk Management Plan. As the Court found:

Kansas state law aims to “protect the public’s general health, safety and welfare” by establishing a peer-review system to monitor the quality of care provided by medical practitioners. Kan. Stat. Ann. § 65-4929(a). Under state law, every hospital must maintain a risk-management program designed to identify violations of the applicable standard of care and to facilitate the reporting of breaches to the Kansas State Board of Nursing (the Nursing Board). *See id.* §§ 65-4922(a), 65-4923.

Opinion at 4; *see also id.* at 10 (“[T]he Kansas statute makes each hospital responsible for ‘establish[ing] and maintain[ing]’ its own system of risk management, subject to the requirements of state law.” (quoting Kan. Stat. Ann. § 4922(a))).

As described in the Hospital’s briefs to the Court, the same regulatory scheme requires Menorah to submit the Plan to the Kansas Department of Health and Environment for approval, and “[f]ailure to submit such a plan shall result in denial of the renewal of the facility’s license.” (Hospital’s Final Br. at 12; Hospital’s Final Reply Br. at 27-28 (citing Kan. Stat. Ann. § 4922(b).) Moreover,

Mark J. Langer, Esq.
August 31, 2017
Page 3

the Hospital also must submit for the state's approval any changes to its Risk Management Plan. Specifically, Kansas law provides, "[a]fter an initial plan is approved, any amendments to the plan shall be submitted to the department." K.A.R. § 28-52-1(f); Kan. Stat. Ann § 65-4922(b). And, as with the initial Plan, the state reviews and either approves or disapproves the changes. K.A.R. § 28-52-1(g) ("Upon review of the facility's risk management plan or any amendments the department shall notify the facility in writing if the plan or amendments have been approved or disapproved.").

The Board's proposed judgment, however, is inconsistent with the Opinion's findings regarding Kansas's regulatory scheme, including the requirement that the state must approve the Plan and any amendments thereto. The Hospital's enclosed proposed judgment rectifies this inconsistency by requiring Menorah, within 14 days of entry of judgment enforcing the Board's order, to submit its revised Plan to the state Department of Health and the Environment. Upon receiving the state's approval, the Hospital would then issue the revised Plan to employees. The Hospital's proposed judgment facilitates compliance with the Hospital's obligations under federal and state law. *See, e.g. Conference of State Bank Supervisors v. Conover*, 710 F.2d 878, 882 (D.C. Cir. 1983) (noting rule of construction "which avoids finding a conflict [between state and federal law] if at all possible").

II. The Board's Proposed Judgment Ignores the Hospital's Confidentiality Interest That Remains in Certain of the Information to be Produced to NNOC.

Under the Opinion and applicable state law, the Hospital has an obligation under state law to maintain the confidentiality of information that falls within the Kansas peer review privilege, notwithstanding the Union's competing interest in obtaining the information. By requiring production of confidential information without any limitation on the information's use or dissemination, the Board's proposed judgment wholly ignores the Hospital's confidentiality obligations.

The Opinion recognized that:

Mark J. Langer, Esq.
August 31, 2017
Page 4

Kansas law attaches a confidentiality privilege to certain aspects of peer-review proceedings:

[T]he reports, statements, memoranda, proceedings, findings and other records submitted to or generated by peer review committees or officers shall be privileged and shall not be subject to discovery, subpoena or other means of legal compulsion for their release to any person or entity . . .

Opinion at 5. The Court construed the privilege as “attach[ing] to documents created to satisfy the peer-review requirements of state law, including eventual consideration by the applicable peer-review committee.” *Id.* at 19. Although the Court upheld the Board’s finding that the Union’s interest in the information prevailed over the Hospital’s confidentiality interest, nothing in the Opinion indicates that information that is otherwise privileged and confidential under Kansas law loses its confidential nature simply because it is also relevant to the Union’s interest. Rather, the Court simply held that the “Board reasonably determined that . . . the Union’s interests in the information prevail over Menorah’s confidentiality interests.” Opinion at 19.

By requiring the Hospital to produce all of the information at issue without any limitations on its use or dissemination, the Board’s proposed judgment fails to conform to the Opinion by ignoring Menorah’s confidentiality interest that remains in certain of the information to be produced to NNOC.

The Hospital’s proposed judgment corrects this imbalance. Under Menorah’s proposed judgment, the Hospital would produce information that is confidential under Kansas law, but subject to a confidentiality agreement that Menorah and the Union would negotiate. Information that the Union requested but that is not confidential under state law would not be subject to the confidentiality agreement.

Mark J. Langer, Esq.
August 31, 2017
Page 5

Specifically, the Opinion classified the information at issue into three categories. The first category includes “information describing the Committee, including the Committee’s structure, purpose, and functions, along with the names of committee members and those present for the hearings.” Opinion at 17. Such information falls outside the privilege and therefore would not be subject to the confidentiality agreement. The second and third categories – “information about allegations investigated by the Committee, including the names of nurses notified that they were under investigation, the nature of the allegations against them, and copies of investigatory information used by the hospital” and “disciplinary documents issued by the Committee” – fall within the privilege and therefore would be produced subject to the confidentiality agreement. *Id.*

Aside from also providing Menorah’s correct location, the Hospital’s proposed judgment is consistent with the Board’s proposed judgment in all other respects.¹

Thank you for your consideration of this matter.

Very truly yours,

/s/ Shay Dvoretzky

Shay Dvoretzky

¹ The NLRB’s proposed judgment incorrectly listed Menorah’s location as Denver, Colorado. The Hospital’s proposed judgment corrects this mistake by providing the Hospital’s accurate location, *i.e.*, Overland Park, Kansas. *See, e.g.*, Opinion at 2 (describing Menorah as a “Kansas acute-care hospital.”).

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

MIDWEST DIVISION–MMC, LLC D/B/A)	
MENORAH MEDICAL CENTER)	
)	
Petitioner/Cross-Respondent)	
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	Nos. 15-1312
)	15-1359
Respondent/Cross-Petitioner)	
)	
NATIONAL NURSES ORGANIZING COMMITTEE-)	
KANSAS/NATIONAL NURSES UNITED)	
)	
Intervenor)	

JUDGMENT

Before: GARLAND, *Chief Judge*, and KAVANAUGH and SRINIVASAN,
Circuit Judges.

THIS CAUSE came to be heard upon a petition filed by Midwest Division–MMC, LLC d/b/a Menorah Medical Center to review an Order of the National Labor Relations Board dated August 27, 2015, in Case Nos. 17-CA-088213 and 17-CA-091912, reported at 362 NLRB No. 193, and upon a cross-application for enforcement filed by the National Labor Relations Board to enforce said Order. The Court heard argument of all parties and has considered the briefs and agency record filed in this cause. On August 18, 2017, the Court, being fully advised in the premises, handed down its opinion granting in part the petition of Midwest Division–MMC, LLC d/b/a Menorah Medical Center and granting in part the Board’s cross-petition for enforcement. In conformity therewith, it is hereby

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ORDERED AND ADJUDGED by the Court that Midwest Division–MMC, LLC d/b/a Menorah Medical Center, Overland Park, Kansas, its officers, agents, successors, and assigns, shall abide by said order (See Attached Order and Appendix).

Judge, United States Court of Appeals
for the District of Columbia Circuit

Judge, United States Court of Appeals
for the District of Columbia Circuit

Judge, United States Court of Appeals
for the District of Columbia Circuit

ENTERED:

NATIONAL LABOR RELATIONS BOARD

v.

MIDWEST DIVISION—MMC, LLC D/B/A
MENORAH MEDICAL CENTER

ORDER

Midwest Division—MMC, LLC d/b/a Menorah Medical Center, Overland Park, Kansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

- (a) Promulgating, maintaining, and enforcing a confidentiality rule prohibiting employees from discussing with other employees discipline or ongoing investigations.
- (b) Refusing to bargain collectively with the National Nurses Organizing Committee—Kansas/National Nurses United, affiliated with National Nurses Organizing Committee/National Nurses United (the Union) by failing and refusing to furnish it with requested information that is necessary and relevant to the Union's performance of its functions as the exclusive collective-bargaining representative of the employees in following unit:

All full-time, part-time and PRN registered nurses employed by Menorah Medical Center, excluding nurse educators, regularly assigned charge nurses, Vascular Lab Techs, infection control/employee health nurses, risk management/performance improvement coordinators, administrative employees, confidential employees, managerial employees, guards and supervisors, as defined in the Act, and all other employees.

- (c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.
 - (a) Within 14 days of the Board's Order, submit a revised Risk Management Plan to the Kansas Department of Health and Environment for approval that does not prohibit employees from disclosing information concerning reportable incidents.
 - (b) Within 14 days of receiving the Kansas Department of Health and Environment's approval of the revised Risk Management Plan, furnish employees with an insert for the current risk management plan that (1) advises that the unlawful provision has been rescinded, or (2) provides a lawfully worded provision on adhesive backing that will cover the unlawful provision; or publish and distribute to employees revised risk management plans that (1) do not contain the unlawful provision, or (2) provide a lawfully worded provision.
 - (c) Furnish to the Union in a timely manner the information requested by the Union on June 1 and 5, 2012, with the information in categories two and three as described in the court's opinion that is confidential under Kansas state law produced pursuant to a confidentiality agreement.
 - (d) Within 14 days after service by the Region, post at its Overland Park, Kansas facility copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 1, 2012.

- (e) Within 21 days after service by the Region, file with the Regional Director for Region 17 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES
COURT OF APPEALS ENFORCING AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO
Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT prohibit you from discussing with other employees discipline or matters under investigation by us or our peer review committees.

WE WILL NOT refuse to bargain collectively with the National Nurses Organizing Committee—Kansas/National Nurses United, affiliated with National Nurses Organizing Committee/National Nurses United (the Union) by failing and refusing to furnish it with requested information that is necessary and relevant to the Union's performance of its functions as the collective-bargaining representative of the employees in following unit:

All full-time, part-time and PRN registered nurses employed by Menorah Medical Center, excluding nurse educators, regularly assigned charge nurses, Vascular Lab Techs, infection control/employee health nurses, risk management/performance improvement coordinators, administrative employees, confidential employees, managerial employees, guards and supervisors, as defined in the Act, and all other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL revise or rescind the confidentiality rule prohibiting you from disclosing information concerning reportable incidents.

WE WILL furnish you with an insert for the current risk management plan that (1) advises that the unlawful provision has been rescinded, or (2) provides a lawfully worded provision on adhesive backing that will cover the unlawful provision; or

WE WILL publish and distribute revised risk management plans that (1) do not contain the unlawful provision, or (2) provide a lawfully worded provision.

WE WILL furnish to the Union in a timely manner the information requested by the Union on June 1 and 5, 2012.

MIDWEST DIVISION—MMC, LLC D/B/A MENORAH MEDICAL CENTER

The Board's decision can be found at www.nlr.gov/case/17-CA-088213 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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Respondent/Cross-Petitioner)	
)	
NATIONAL NURSES ORGANIZING COMMITTEE-)	
KANSAS/NATIONAL NURSES UNITED)	
)	
Intervenor)	

CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2017, I electronically filed the foregoing document with the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. I further certify that the foregoing document was served on all parties or their counsel of record through the appellate CM/ECF system.

/s/ Shay Dvoretzky
Shay Dvoretzky
Jones Day
51 Louisiana Ave., N.W.
Washington, D.C. 20001-2113

Dated at Washington, D.C.
this 31st day of August,
2017